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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CITY OF MILWAUKIE,

Plaintiff,

vs.

NORTHLAND CASUALTY COMPANY,
a Minnesota corporation,

Defendant.

Case No. CV09-564-HU
OPINION AND ORDER

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HUBEL, Magistrate Judge:

This case is before the court on cross motions for summary judgment. Plaintiff City of Milwaukie (the City) seeks the costs of defending the case brought against it in Emmert International v.

1 City of Milwaukie, CV 05-514-HU, from Northland Casualty Company
2 (Northland), its insurer at the relvant time period. The City also
3 seeks its attorney fees in prosecuting this action under ORS
4 742.061.

5 Northland contends there is no coverage extended to the City
6 under its policy of insurance (the Northland policy) for the Emmert
7 complaint, and if there were any, it is excluded by applicable
8 provisions of the Northland Policy. In a case such as this, the
9 insured, the City, has the burden to establish that there is
10 coverage, Employers Ins. of Wausau v. Tektronix, 211 Or. App. 485,
11 509, 156 P.3d 105 (2007), and the insurer has the burden to
12 establish the applicability of any exclusions within its policy it
13 contends eliminate any duty to defend the underlying lawsuit. Id.

14 **The Emmert Complaint**

15 The Emmert complaint alleges three claims following six
16 paragraphs of common factual allegations. Those common factual
17 allegations include:

18 Emmert communicated to the City its displeasure with the
19 City's inflexibility, and informed the City that Emmert
20 believed the City's intransigence was unreasonable,
illegal, and personal to Emmert and its owner, Terry
Emmert.

21 Complaint ¶ 7, Northland Concise Statement of Fact (CSF), Exhibit
22 A and:

23 ... despite the fact that the proposals Emmert made to
24 the City qualified outright for the necessary permits to
25 relocate the structure, the City failed and refused to
26 grant the necessary permits unless and until Emmert
27 agreed to waive any and all claims he might have against
the City for the City's actions relating to its previous
denials of permits, waivers, and the entire subject
matter of the structure.

1 Id. at ¶ 11.

2 The first claim then goes on to allege a deprivation of a
3 constitutionally protected property interest against the City for
4 refusing to issue the necessary permits to move the structure. The
5 City characterizes this claim as really multiple claims couched as
6 one (procedural and/or substantive due process claims for example).

7 The second claim alleges the unconstitutional exaction of a
8 protected liberty interest in the demand of the waiver of the right
9 to sue for any past actions by the City before the permits would be
10 issued. The third claim alleges an equal protection claim for
11 failure to issue the permits when others similarly situated were
12 issued permits. None of the claims alleges whether the actions
13 attributed to the City were with the intent to harm Emmert, or were
14 done recklessly or negligently in the face of the foreseeable harm
15 to Emmert, and in that sense may be interpreted as alleging
16 liability based on any of these degrees of culpability.

17 **The Northland Policy**

18 The following language appears in the Northland policy.

19 **INSURING AGREEMENT**

20 We will pay those sums that the insured becomes legally
obligated to pay as "damages" because of:

21 ***

22 2. Any negligent act, error or omission: or
23 3. "Personal injury," "advertising injury" or violation
of civil rights which is caused by an offense,

24 arising out of an "occurrence" which takes place during
the policy period and to which this insurance applies.

25 Northland CSF Exhibit A, p. 12.

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1 **DEFINITIONS**

2 * * *

3 2. "Advertising injury" means injury arising solely
4 out of one or more of the following offenses,
5 committed in the course of advertising your goods,
6 products or services:

7 a. Oral or written publication of material
8 that slanders or libels a person or
9 organization or disparages a person's or
10 organization's goods, products, or
11 services;

12 b. Oral or written publication of material
13 that violates a person's right of
14 privacy;

15 c. Misappropriation of advertising ideas or
16 style of doing business; or

17 d. Infringement of copyrighted advertising
18 materials, titles, or slogans.

19 * * *

20 4. "Bodily injury" means bodily injury, sickness, or
21 disease sustained by a person, including death
22 resulting from any of these at any time.

23 * * *

24 12. "Occurrence" means an accident, including
25 continuous or repeated exposure to substantially
26 the same general harmful conditions.

27 * * *

28 14. "Personal injury" means injury, other than "bodily
injury," arising out of one or more of the following
offenses:

a. False arrest, detention, or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or
invasion of the right of private occupancy of a
room, dwelling, or premises that a person occupies
by or on behalf of its owner, landlord, or lessor;

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- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;
- e. Oral or written publication of material that violates a person's right of privacy; or
- f. False or improper service or process.

EXCLUSIONS

* * *

3. Condemnation

Claims for loss or "damage" or any liability of any and all insureds arising out of or in any way connected with the application of the principle of eminent domain, condemnation, inverse condemnation by whatever name called regardless of whether such claims are made directly against the insured or by virtue of any agreement entered into by or on behalf of the insured. This exclusion also includes but is not limited to, any action or suit for an alleged taking of or "damage" to real or personal property based upon: an alleged violation of Article I Section 18 of the Oregon Constitution; Article XI, Section 4 of the Oregon Constitution; and any action or suit for an alleged taking of or "damage" to real or personal property based upon an alleged violation of any federal or state law and any provision or amendment of the Constitution of the United States, including but not limited to the Fifth and Fourteenth Amendments to the United States Constitution, whether such action is brought pursuant to 42 U.S.C. § 1983 or some other provision of state or federal law. This exclusion applies to all the coverages set forth in this policy of insurance, whether such coverage is provided in the insuring agreement or by an endorsement.

* * *

5. Expected or Intended Damage or Injury

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1 Any "damages" expected or intended from the
2 standpoint of an insured....

3 * * *

4 **The Northland Policy grants coverage for**
5 **at least one claim in the Emmert complaint**

6 The City contends that the Northland Policy provides coverage
7 for the defense of the Emmert complaint flowing from the third
8 grant of coverage, in the "violation of civil rights" language.
9 Northland contends that there is no "occurrence" alleged in the
10 Emmert complaint, as there is nothing alleged to be an accident
11 there. Northland also argues for two exclusions that will be
12 discussed below.

13 The third grant of coverage encompasses personal injury,
14 advertising injury, or a violation of civil rights, each of which
15 must be caused by an offense that arises out of an occurrence.
16 Personal injury is defined in the policy and includes injury other
17 than bodily injury arising out of one or more of a list of
18 enumerated offenses, all of which are torts. Advertising injury is
19 defined in the policy as an injury (unqualified) that arises solely
20 out of one or more of a list of specific offenses, all of which are
21 torts. While the list of torts has common listings for both
22 personal injury and advertising injury, they are not co-extensive.
23 Civil rights violations is a term that is not defined in the
24 policy.

25 The language "caused by an offense" of the third coverage
26 grant, suggests that it is not all personal injuries, advertising
27 injuries, or civil rights violations which are covered. The policy

1 definition of personal and advertising injuries suggest the
2 limitation on types of offense that are intended for each of them
3 are to specific enumerated torts, all of which require an intent to
4 harm. The absence of any such limitation in the policy for civil
5 rights violations suggests that some broader classification of
6 offenses intended for civil rights violations. The text and context
7 suggest that it would be any tort offense. But this can include
8 intentional torts, negligence, and other torts such as trespass
9 which can be based on either negligent or intentional conduct. See
10 Ferguson v. Birmingham Fire Insurance Co., 254 Or. 496, 460 P.2d
11 342 (1969); Abrams v. General Star Indemnity Company, 335 Or. 392,
12 400, 67 P.3d 931 (2003). The Oregon Supreme Court suggested that
13 Ferguson and Ledford v. Gutoski, 319 Or. 397, 877 P.2d 80 (1994)
14 lead to:

15 the following approach for answering any duty-to-defend
16 question when the complaint contains allegations of
17 conduct that are excluded under the insurance policy.
18 First, the court must determine whether the complaint
19 contains allegations of covered conduct. If it does, as
20 the trespass complaint did in Ferguson, then the insurer
has a duty to defend, even if the complaint also includes
allegations of excluded conduct. If the complaint does
not contain allegations of covered conduct, as was the
case with the malicious prosecution complaint before the
court in Ledford, then the insurer has no duty to defend.

21 Abrams, 335 Or. at 400.

22 Neither personal injury nor advertising injury is alleged in
23 the Emmert complaint. Violations of civil rights are alleged.
24 However, to be covered, the civil rights violations must arise out
25 of an occurrence, which is an accident, according to the policy.
26 CSF, Exhibit A, p. 14.

1 In the context of an insurance policy, there have been many
2 cases addressing the meaning of an accident. The critical piece to
3 examine is the standard of care/fault/culpability necessary to
4 support a verdict against the City on the claims alleged in the
5 Emmert complaint. Unlike the complaint in Abrams, the Emmert
6 complaint does not allege a subjective intent to harm by the City
7 or its employees. It alleges acts (denial of permits and demand for
8 a release) that were intentional, and it alleges Emmert's belief
9 that the City's actions were "personal to Emmert and its owner,
10 Terry Emmert." The conduct of the City employees could have been
11 intentional in the sense of (1) intended to harm Emmert, or (2)
12 intended without concern for what harm might ensue. Alternatively,
13 the employees' conduct could have been (3) negligent with harm
14 reasonably foreseeable, or (4) completely legal (faultless) conduct
15 that had harmful consequences (i.e., if the permit was not one that
16 should be issued for legitimate reasons substantively or
17 procedurally, but had the alleged effect of Emmert losing the
18 building).

19 Without addressing the first and third claims of the Emmert
20 complaint, the second claim does not require that the City be found
21 to have intended Emmert's loss/harm in order for Emmert to have
22 recovered. In other words, the deprivation of civil rights alleged
23 there need not be based on an act intended to harm. It is not the
24 "act" of denying the permit which carried the potential to be
25 actionable as a constitutional violation; rather, it was the
26 coupling of the requirement for the release with the issuance of
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1 the permits. It was possible under the allegations of the second
2 claim for Emmert to have prevailed if it proved the City, through
3 its employees, negligently required the release before issuing
4 permits, believing it did not deny Emmert a constitutional right of
5 access to the courts. As discussed in the Emmert Opinion and Order
6 of August 30, 2006, a claim of unconstitutional conditions in a
7 settlement context requires an analysis of whether the condition is
8 reasonably tied to a legitimate governmental interest and whether
9 there is a nexus between the governmental interest and the specific
10 right waived. Intent is not an element of the claim.

11 Recovery on the second claim depended on many things, but it
12 did not require an intentional deprivation of a constitutional
13 right that would not constitute an occurrence. Like the conversion
14 claim in Abrams and the trespass claim in Ferguson, the second
15 claim could have arguably been successful upon proof of conduct
16 that was not intended to harm Emmert.

17 Also keep in mind that the outcome of the case against the
18 City is completely irrelevant to a determination of the duty to
19 defend. The fact that I determined that no claim was stated or
20 could be stated, at least on the facts as they developed is of no
21 help to Northland on the duty to defend. The court looks only at
22 two documents, the complaint and the insurance policy, and does not
23 determine whether the complaint would have survived litigation and
24 produced a judgment against the insured. See Marleau v. Truck Ins.
25 Exch., 333 Or. 82, 91, 37 P.3d 148 (2001).

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1 The question in this situation is not whether the conduct
2 attributed to the insured was intentional, but whether an injury to
3 the victim or others was intended by the insured when the insured
4 acted. As Ferguson and Abrams pointed out, even a complaint
5 alleging a single cause of action based on intentionally caused
6 injury may give rise to a duty to defend if, without amendment, the
7 facts alleged would support liability for conduct covered by the
8 policy. Ferguson 254 Or. at 507, Abrams, 335 Or. at 399. Thus the
9 City's burden to establish allegations within the grant of coverage
10 in the Emmert complaint is satisfied. This also disposes of the
11 arguments by Northland that the Emmert allegations did not allege
12 an occurrence.

13 **Exclusions do not apply to eliminate a duty to defend**

14 Turning to the exclusions raised by Northland, the discussion
15 above regarding an occurrence applies equally to the exclusion for
16 expected or intended harm. The allegations of the Emmert complaint
17 and this record on summary judgment do not support the application
18 of the expected or intended harm exclusion to all possible outcomes
19 of the Emmert complaint and therefore the duty to defend is not
20 eliminated by that exclusion.

21 Northland asserts that even if the complaint could be
22 interpreted as alleging a civil rights violation caused by an
23 offense arising out of an "occurrence," there is no coverage
24 because of the condemnation exclusion.

25 The condemnation exclusion deals with liability "arising out
26 of or in any way connected with" application of the "principle of
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1 eminent domain, condemnation, inverse condemnation, by whatever
2 name called." See Policy p. 12, § 5. Although "inverse
3 condemnation" is not defined in the policy, the Oregon Supreme
4 Court has held:

5 An inverse condemnation occurs when a governmental entity
6 effectively takes property without actually exercising
7 its power of eminent domain. ... [T]his court has defined
8 inverse condemnation this way:

9 Inverse condemnation is the name given to a
10 cause of action against a governmental agency
11 to recover the value of property which has
12 been taken in fact by the governmental agency,
13 even though there has been no formal exercise
14 of the power of eminent domain. ..." Hawkins
15 v. City of LaGrande, 315 Or. 57, 67, 843 P.2d
16 400 (1992) ...

17 State ex rel. Dept. of Transp. v. Hewett Professional Group, 321
18 Or. 118, 130-32, 895 P.2d 755 (1995).

19 Northland argues that the complaint essentially asserts a
20 claim for a taking or for damage to real or personal property. The
21 complaint alleges that in refusing to grant Emmert the permits, the
22 City "exacted an unconstitutional deprivation of Emmert's property
23 interest in the permits," thereby depriving Emmert of a "property
24 interest without due process of law;" engaged in "unconstitutional
25 exaction of a constitutionally protected liberty interest," or
26 depriving Emmert of its "protected liberty interest in access to
27 the courts, without due process of law" by conditioning the permits
28 on the waiver of claims; and "denied Emmert permits to which Emmert
had a claim of entitlement, on a basis that was arbitrary,
capricious, and not consistent with the treatment of other
applicants." Northland argues that despite the pleading of claims

1 as constitutional violations, the complaint is essentially one for
2 taking, based on the City's conduct in declaring the structure a
3 nuisance, denying Emmert permits to move it, and then demolishing
4 it.

5 The City counters that the condemnation exclusion of the
6 policy is inapplicable, arguing that the first sentence, which
7 excludes claims for "inverse condemnation by whatever name called,"
8 does not apply because during the Emmert litigation, the court
9 rejected the City's contention that Emmert's constitutional claims
10 were properly characterized as inverse condemnation claims.
11 Consequently, the City argues, "the court's reasoning shows that
12 the Emmert complaint *could* be interpreted to avoid the inverse
13 condemnation exclusion," and "that is all that is necessary."

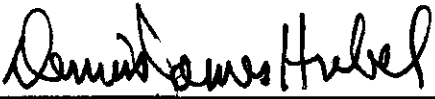
14 I agree. The issue here is not the decision the court made in
15 disposing of the Emmert claims. The possibility that I could have
16 decided Emmert's claims were properly characterized as inverse
17 condemnation claims which would be within the exclusion begs the
18 question. It was the possibility that the Emmert claims would **not**
19 be characterized as inverse condemnation claims which eliminated
20 that exclusion as an avenue for Northland to escape defending the
21 Emmert case.

22 **Conclusion**

23 The City's motion for summary judgment (doc. # 11) is GRANTED.
24 Northland's motion for summary judgment (doc. # 16) is DENIED. The
25 City's alternative request that the court dismiss Northland's
26 affirmative defenses is DENIED AS MOOT.

1 IT IS SO ORDERED.

2 Dated this 27th day of APRIL, 2010.

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5 Dennis James Hubel
6 United States Magistrate Judge
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